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Mukand Ltd v Malaysia Steel Works (KL) Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–974 OF 2006
ZALEHA ZAHARI, HELILIAH AND VINCENT NG JJCA
7 JANUARY 2010

B

Contract — Breach — Sales of goods — Contract to supply, installation and service of cranes — Whether seller failed to carry out necessary tests — Seller failed to commission system — Whether cables used of inferior quality — Whether breakdown of cranes caused by mishandling by buyer — No complaints lodged by buyer during warranty period — Whether seller liable to make good complaints made outside warranty period — Whether breach established

C

D

Evidence — Hearsay — Statement made by person not called — Witness not able to verify statement or explain inconsistencies in documents — Statement not marked as exhibits — Whether documents could be admissible as documents maintained in course of business — Evidence Act 1950 s 32

E

Sale of Goods — Goods sold and delivered — Fitness for purpose — Whether goods inspected, tested and approved — Acceptance by usage — When buyer deemed to have accepted goods — Sale of Goods Act 1957 s 42

F

Pursuant to a contract, the appellant/plaintiff was to supply to the respondent/defendant electrically operated overhead traveling cranes ('the cranes') and spares, gantry rails and 'Down Shop Lead Systems' ('the system') as well as services of supervision for installation, commissioning and training. The cranes were to be manufactured in the plaintiff's factory in India and to be assembled with the assistance of the plaintiff at the defendant's factory in Malaysia. The system consisted of seven cranes each with a specified function. The contract required the defendant to carry out 'shop test' in India before dispatch. Erection and commissioning of the cranes/component parts was to commence eight weeks from the date of shipment. The defendant refused to pay the contract price alleging, inter alia, that there was a failure to commission the system. The learned trial judge held that the plaintiff had failed to carry out 'shop tests' at its factory in India before exporting the cranes to Malaysia. The judge further held that there was a failure to commission the system. The judge also found that the cables used were of inferior quality (underrated) and not in accordance with specifications and design. The defendant's counterclaim for a total sum of RM3,728,203.24 was allowed. Hence this appeal by the plaintiff.

G

H

I

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Held, allowing the appellant's appeal with costs here and court below and dismissing the responent's counterclaim:

(1) There was in evidence of the cranes having passed three sets of tests. The cranes had been inspected, tested and approved by the defendant's own representative. There was also evidence of the cranes being inspected by Jabatan Keselamatan dan Kesihatan Pekerjaan Malaysia and being subjected to load, stability and drop test. The evidence of successful erection and commissioning of the system was clearly evident from the declaration in the test reports signed by both parties. In the light of these evidence, the trial judge was in error in finding that 'commissioning' as required by the contract had not been carried out (see paras 10–11).

(2) Having accepted delivery of the cranes, used them throughout the warranty period, one can conclude that there was no error in cable selection and was functioning satisfactorily during this period. The documentary evidence showed breakdown and stoppage of cranes being caused by the defendant mishandling the same. The defendant had admitted to modifying the electrical circuits on the cranes. The evidence clearly established that, upon commissioning, the cranes were operating smoothly (see paras 16–18).

(3) No complaints were lodged with the plaintiff in respect of the system during the warranty period. As the alleged defects raised by the defendant were made outside the warranty period the plaintiff was accordingly not liable to make good the same. Acceptance by usage was the most compelling evidence of acceptance. Failure to reject the cranes within the warranty period affirmed that acceptance. Section 42 of the Sale of Goods Act 1957 applied (see paras 21–24).

(4) The defendants counterclaim should have been dismissed. The claim for installation of new cables was unwarranted and should not have been allowed. Likewise the claim for loss of manpower. In any event exh D104, a schedule prepared by DW4 representing loss of labour cost specially prepared for trial, had candidly admitted to having no knowledge of the same as she joined the defendant only in 2003. DW4 admitted to being unable to explain inconsistencies in the figures in D104 from the figures used by the previous human resource manager. ID 105 and ID 106 has not been marked as exhibits. The trial judge accepted ID 105 and ID 106 as evidence on the ground that the documents were maintained in the course of business, made by the relevant operators and duly verified. No cogent evidence was led from which the trial judge could draw these conclusions. The provisions of s 32 of the Evidence Act 1950 had not been satisfied and the documentary evidence (ID 105 and ID 106) was accordingly inadmissible (see paras 27–28).

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[Bahasa Malaysia summary

Menurut kontrak, perayu/plaintif sepatutnya membekal kepada responden/defendan Kren yang Bergerak Atas yang Beroperasi secara Elektrik ('kren tersebut') dan alat gentiagan, rel gantri dan 'Down Shop Lead Systems' ('sistem tersebut') dan juga pekhidmatan penyeliaan untuk pemasangan, pengkomisenan dan latihan. Kren tersebut sepatutnya diperbuat dalam kilang plaintif di India dan dipasang dengan bantuan plaintif di kilang defendan di Malaysia. Sistem tersebut mengandungi tujuh kren di mana setiap satu mempunyai fungsi khusus. Kontrak menghendaki defendan menjalankan 'shop test' di India sebelum hantaran. Penegakan dan pengkomisenan kren/bahagian komponen sepatutnya bermula lapan minggu dari tarikh penghantaran. Defendan enggan membayar harga kontrak dengan mengatakan, antara lain, bahawa terdapat kegagalan untuk mengkomisenkan sistem tersebut. Hakim perbicaraan yang bijaksana memutuskan bahawa plaintif telah gagal untuk menjalankan 'shop tests' di kilangnya di India sebelum mengeksport kren tersebut ke Malaysia. Hakim selanjutnya memutuskan bahawa terdapat kegagalan untuk mengkomisenkan sistem tersebut. Hakim juga mendapati bahawa kabel yang digunakan tidak bermutu rendah dan tidak mematuhi spesifikasi dan reka bentuk. Tuntutan balas defendan berjumlah RM3,728,203.24 telah dibenarkan. Justeru itu rayuan ini oleh plaintif.

Diputuskan, membenarkan rayuan perayu dengan kos di mahkamah ini dan Mahkamah Tinggi dan menolak tuntuan balas responden:

(1) Terdapat keterangan kren tersebut telah lulus tiga set ujian. Kren tersebut telah diperiksa, diuji dan diluluskan oleh wakil defendan sendiri. Terdapat juga keterangan kren tersebut telah diperiksa oleh Jabatan Keselamatan dan Kesihatan Pekerjaan Malaysia dan telah melalui ujian mengangkat, imbangan dan menurunkan barangan. Keterangan tentang penegakan yang berjaya dan pengkomisenan sistem jelas terbukti daripada deklarasi dalam laporan ujian yang ditandatangani oleh kedua-dua pihak. Berdasarkan keterangan tersebut, hakim perbicaraan terkhilaf dalam penemuan bahawa 'commissioning' sepertimana dikehendaki kontrak tidak dilaksanakan (lihat perenggan 10–11).

(2) Setelah menerima penghantaran kren tersebut digunakan sepanjang tempoh waranti, seseorang boleh membuat kesimpulan bahawa tiada kesilapan dalam pilihan kabel dan telah berfungsi dengan memuaskan sepanjang tempoh ini. Keterangan dokumentar menunjukkan kerosakan dan pemogokan kren tersebut yang disebabkan oleh defendan salah mengendalikan yang sama. Defendan mengakui telah mengubah litar elektrik pada kren tersebut. Keterangan jelas membuktikan bahawa, setelah digunakan, kren tersebut beroperasi dengan lancar (lihat perenggan 16–18).

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(3) Tiada aduan dikemukakan dengan plaintif berkaitan sistem tersebut sepanjang tempoh waranti. Sepertimana kecacatan yang ditimbulkan oleh defendan telah dibuat di luar tempoh waranti plaintif sewajarnya tidak bertanggungjawab untuk memperbaiki yang sama. Penerimaan melalui penggunaan merupakan bukti nyata penerimaan. Kegagalan untuk tidak menerima kren tersebut dalam tempoh waranti telah mengesahkan penerimaan tersebut. Seksyen 42 Akta Jualan Barangan 1957 terpakai (lihat perenggan 21–24).

(4) Tuntutan balas defendan patut ditolak. Tuntutan untuk pemasangan kabel baru tidak wajar dan tidak patut dibenarkan. Begitu juga dengan tuntutan untuk kehilangan tenaga manusia. Dalam apa keadaan eksh D104, satu jadual yang disediakan oleh DW4 yang mengemukakan kehilangan kos kerja yang khusus disediakan untuk perbicaraan, telah secara terus terang diakui tidak mempunyai pengetahuan yang sama kerana dia mula bekerja dengan defendan hanya dalam tahun 2003. DW4 mengakui tidak dapat menjelaskan angka-angka yang tidak konsisten dalam D104 dengan angka-angka yang digunakan oleh pengurus sumber manusia. ID 105 dan ID 106 tidak ditanda sebagai ekshibit. Hakim perbicaraan menerima ID 105 dan ID 106 sebagai bukti atas alasan bahawa dokumen-dokumen tersebut telah diselenggarakan sepanjang perniagaan, dibuat oleh operator relevan dan telah disahkan. Tiada bukti yang meyakinkan telah dikemukakan yang mana hakim perbicaraan boleh membuat kesimpulan berikut. Peruntukan s 32 Akta Keterangan 1950 tidak dipatuhi dan keterangan dokumentar (ID 105 dan ID 106) tidak patut diterima (lihat perenggan 27–28).]

Notes:

For a case on fitness on purpose, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) para 766.

For cases on sale of goods, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2578–2579.

For cases on statement made by person not called, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1950–1953.

Legislation referred to

Evidence Act 1950 s 32
Sale of Goods Act 1957 s 42

Appeal from: Civil Suit No 05–22–1312 of 1999 (High Court, Kuala Lumpur)

Robert Lazar (SY Liew with him) (Shearn Delamore & Co) for the appellant.
V Balasingam (Kemala bt Alang with him) (Balasingam & Co) for the respondent.

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Zaleha Zahari JCA (delivering judgment of the court):

[1] In this judgment parties will be cited as they appear in the court below.

[2] The unanimous decision of this court was to allow this appeal with costs. The decision of the High Court judge dated 19 September 2006 was set aside for the following reasons.

BACKGROUND

[3] The background facts are these: By an agreement dated 12 July 95 as amended by letter dated 31 October 1995 ('the contract'), the appellant ('the plaintiff') was to supply to the respondent ('the defendant'), electrically operated overhead traveling cranes ('the cranes') and spares, gantry rails and 'down shop lead systems' ('the system') as well as services of supervision for installation, commissioning and training. The cranes were to be manufactured in the plaintiff's factory in India and to be assembled with the assistance of the plaintiff at the defendant's factory in Malaysia. The contract value was US$2,404,307. The payment terms are as provided in cl 10.

[4] What was contemplated to be covered by the contract was this. The system consists of seven cranes each with a specified function. One crane was to lift the scrap metal to be placed in a scrap bucket. The bucket containing the scrap metal would then be transferred to another crane, which would then take the bucket to a furnace where the scrap metal would be melted into molten. The molten scrap metal would then be transferred into a ladle, which ladle would be taken by another crane to another part of the factory where the molten would be transferred into a rail line furnace pot, then be taken by another crane for refining of the molten. After refining, another crane would take it to the casting machine where billets would be molded. The billets would then be taken by another crane to the storage yard.

[5] The contract required the defendant to carry out 'shop test' in India before dispatch. Erection and commissioning of the cranes/component parts was to commence eight weeks from the date of shipment. A 'certificate of acceptance' was to be issued within three working days after completion of the start up commissioning (cl 6.5) which certificate was to be signed by both parties signifying the plaintiff's fulfillment of their obligations under the contract.

[6] Clause 8.2 provides for a warranty period and exemption of warranty in the following terms:

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> The merchandise will be free from defects in material and workmanship for a period of twelve (12) months from the date of commissioning, or eighteen (18) months from last shipment date whichever is earlier … However this warranty does not cover mishandling, normal wear and tear, and also customer's non adherence to instructions of the operation and maintenance manual supplied by the Seller.

[7] The issues raised in argument will now be dealt with in turn.

Whether shop testing carried out? Whether commissioning and certificate of acceptance issued?

[8] The judge's finding was that the system purchased was a complete system in the processing of melting scrap metal into molten metal and storing the billets.

[9] Based on the evidence before him the learned judge held that the plaintiff had failed to carry out 'shop tests' at its factory in India before exporting the cranes to Malaysia. The judge further held that there was a failure to commission the system pursuant to cl 6.5. He was of the view that 'commissioning' encompassed the whole system, from the first crane picking up the scrap metal up to the time the billets are made and taken for storage and stacking. The judge held that evidence of tests being carried out on individual cranes separately, one at a time, and reports on the performance of an individual crane was insufficient and does not constitute 'commissioning' of the system. The related and inter-related functions of the seven cranes have to be tested with all the seven cranes in operation at one and the same time and seen to be operating smoothly. Only then was the plaintiff entitled to say commissioning was done.

[10] Our views on this issue are as follows: On the judge's finding that the plaintiff was contractually bound to supply a seven functioning cranes which has to be operational at one and the same time clearly did not reflect the true position by reason of the staggered delivery dates for the cranes. There is in evidence of the cranes having passed three sets of tests. The cranes had been inspected, tested and approved by the defendant's own representative, Mr KR Iyer of Messrs R Singh & Associate, in India at the plaintiff's factory before shipment. It was only after Messrs R Singh & Associate's inspection and clearance, were arrangements for shipment made. Thus, in our opinion, the judge's finding that 'shop testing' as required by the contract had not been carried out, is clearly not in accord with the evidence before him.

[11] There is then the evidence of the cranes being inspected by Jabatan Keselamatan dan Kesihatan Pekerjaan Malaysia and being subjected to load, stability and drop test on 10 October 1997. These tests, being mandatory tests,

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formed part of the safety requirements of the Government of Malaysia. We also note from the evidence that PW2 was present during the conduct of these tests together with Mr Kong Kam Sang (the defendant's general manager). DW1, who was called, did not dispute the same. The evidence of successful erection and commissioning of the system was clearly evident from the declaration in the test reports signed by both parties. In the light of these oral and documentary evidence, the trial judge was in error in finding that 'commissioning' as required by the contract had not been carried out.

Whether cables not in accordance with specifications and design?

[12] Based on the evidence before him the judge's finding was that the cables used were of inferior quality (underrated), not in accordance with specifications and design. The judge also rejected the plaintiff's contentions that the burning of the cables was due to overloading of the cranes by the defendant.

[13] The defendant in their defence had contended that the cables recommended, designed and used were underrated, not in accordance with specifications and design. It was further alleged that as a result of poor design, inappropriate and underrated cables in three of the cranes, there were frequent burning of the cables resulting in frequent stoppage of the cranes and the production line, necessitating the defendant to change the cables from 'aluminum' cables to 'copper' cables. The defendant denied being guilty of overloading. Their case was that the cranes should have been able to cope with an occasional overload by reason of the overload provision. The cranes should have been able to handle safely the occasional over load during daily use, as the quantity of the material lifted was determined by the crane driver's naked eye, as there was no instrument in the crane to indicate the weight of the material lifted. The defendant had further alleged that there system lacked smoothness in the automatic change over from speed to speed, resulting in friction affecting the mechanical and electrical system.

[14] The plaintiff took issues. Their case was that the cables of the cranes were to be manufactured in accordance with the relevant Indian Standard IS:4137, with specific hoisting abilities, (eg 10T, 15T, 25T), the tonnage designation being its load capacity. The defendant had knowledge of the cables selected prior to acceptance. The selection of cables was part of the design of the cranes. The defendant was obliged to use the cranes for the rated loads. The plaintiff had, through PW1, adduced evidence to the effect that the crane could carry only once in its life time the overload (125%), ie during the test period.

[15] We have scrutinised the evidence on this issue carefully. In respect of the cables selected, we note that DW1 was not in the defendant's employment

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when the cables were selected. DW1 was unaware of the letter approving the engineering drawings, of the cable selection chart which sets out the cables to be used for the respective motors of the cranes. DW1 confirmed the chart had been given to the defendant and that the cables had been selected in accordance with the chart. DW1 in his evidence admitted to having no experience in designing cranes and in not being conversant with the Indian standards. DW1 was unaware that the defendant's representative had inspected and approved the cranes prior to shipment.

[16] Having accepted delivery of the cranes, used them throughout the warranty period, one can conclude that the system there was no error in cable selection and was functioning satisfactorily during this period.

[17] The documentary evidence shows breakdown and stoppage of cranes being caused by the defendant mishandling the same. The defendant had admitted to modifying the electrical circuits on the cranes. It was suggested that the time relay was in all probability disturbed by modification made to the circuit by the defendant without the plaintiff's consent, affecting the smooth changeover. DW1 in his testimony has admitted to that effect and the documents exhibited supports the plaintiff's case.

[18] In our considered opinion there was clearly non appraisal by the trial judge of material evidence in arriving at his findings and conclusions which he did on this issue. The evidence clearly established that, upon commissioning, the cranes were operating smoothly. The test approvals signed by the defendant and the satisfactory use of the cranes throughout the warranty period surely established this fact.

[19] In our view nothing turns on the issue of the non-functioning PCB Cards. These cards were working when they were supplied to the defendant, which had been duly approved by the defendant's representatives, before shipment in 1997. Spare PCB cards were supplied by the plaintiff to commission the cranes. The commissioning was completed and the cranes were accepted by the defendant. The PCB cards found defective had been repaired but however was not released due the defendant's failure to pay the outstanding sum due. We note the non-return of the repaired PCB cards did not cause any damage as the defendant was able to purchase new PCB cards and it is not in issue there was continued usage of the cranes by the defendant.

[20] Whether the warranty period had expired?

[21] No complaints were lodged with the plaintiff in respect of the system during the warranty period which period expired as follows:

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W/O	Description	Shipment	Expiry Date of Warranty
3730	15T x 31.5M Scrap Bay Crane	19.7.1996	19.1.1998
3731	15T x 31M Scrap Bay Crane	19.7.1996	19.1.1998
3732\	100/25T Ladle Crane	5.10.1996	5.4.1998
3733	100/25T Ladle Crane	5.10.1996	5.4.1998
3734	40/10T Charging Crane	23.8.1996	23.2.1998
3735	15T x 31M Billet Crane	19.7.1996	19.1.1998
3736	5T Additive Crane	23.8.1996	23.2.1998

[22] The defendant only lodged a complaint as to the quality of the cranes and refused to pay the outstanding sums on 4 June 1998. As the alleged defects raised by the defendant were made outside the warranty period the plaintiff was accordingly not liable to make good the same.

[23] Acceptance by usage was the most compelling evidence of acceptance. Failure to reject the cranes within the warranty period affirmed that acceptance.

[24] On this issue we are in agreement with the submissions of the appellant's counsel that s 42 of the Sale of Goods Act 1957 applies. This provision provides that:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

[25] By reason of our findings as enumerated the decision of the High Court judge dismissing the plaintiff's claim is set aside and directed above judgment be entered in favour of the plaintiff.

THE DEFENDANT'S COUNTERCLAIM

[26] The defendant counterclaimed a total sum of RM3,728,203.24 under four headings. The defendant in seeking damages in the counterclaim has the burden of proving, both the fact and the amount of damages. The trial judge allowed the defendant's counterclaim with costs on the basis that it had not been seriously challenged.

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[27] We are of the view the defendant's counterclaim should have been dismissed. The claim for installation of new cables was unwarranted and should not have been allowed by reason of our earlier findings in allowing the plaintiff claim. Likewise the claim for loss of manpower. In any event exh D104, a schedule prepared by DW4 representing loss of labour cost specially prepared for trial, had candidly admitted to having no knowledge of the same as she joined the defendant only in 2003, DW4 admitted to being unable to explain inconsistencies in the figures in D104 from the figures used by the previous human resource manager, Ms May Ooi.

[28] ID 105 and ID 106 has not been marked as exhibits. The trial judge accepted ID 105 and ID 106 as evidence on the ground that the documents were maintained in the course of business, made by the relevant operators and duly verified. No cogent evidence was led from which the trial judge could draw these conclusions. The provisions of s 32 of the Evidence Act has not been satisfied and the documentary evidence in ID 105 and ID 106 was accordingly inadmissible.

[29] The trial judge accepted the evidence of DW3 and exh D100 in respect of the claim for bank charges. These bank charges relates to loans for the construction of a steel mill for the period 1996–1999. There is no reason why the plaintiff should be made to bear the defendant's financing charges for a steel mill. The last of the cranes were commissioned in October 1997. The first complaint of defective cranes was made in June 1998. There is no allegations of delay in delivery of the cranes. There is therefore no basis for the plaintiff to be made liable for bank charges for the period 1996–1999.

[30] To conclude, the defendant's counterclaim was clearly an afterthought, which should have been dismissed with costs.

CONCLUSION

[31] The appeal is allowed with costs here and below. The decision of the High Court judge was set aside. We directed judgment in favour of the appellant/plaintiff in the sum of US$206,539.95 with interest at 8% from 10 May 1999. The respondent/defendant's counterclaim is dismissed. The deposit to the appellant.

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Appellant's appeal allowed with costs here and court below and respondent's counterclaim dismissed.

Reported by Kanesh Sundrum